



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

RECENT AMERICAN DECISIONS.

*Common Pleas of Huntingdon County, Pennsylvania.*ROBERT MITCHELL *vs.* THE PENNSYLVANIA R. R. COMPANY.

1. One employee or servant has no right of action against the principal or master for an injury sustained through the negligence of another employee or servant in the same service.
2. When a Rail Road Company places in the hands of one that it employs, when he is employed, printed rules and regulations to which he is required to conform if he enters into their service or employment, one of which is, that "*the regular compensation will cover all risk or liability from any cause whatever, in the service of the Company,*" that becomes an *express* provision of the contract, by which he waives all claim for any injury received in such service.

This was an action on the case, tried at August Term, 1853, in which the plaintiff claimed damages from the Pennsylvania Rail Road Company, for injuries received in a collision between a burden and passenger train on the 25th of July, 1851. The facts are sufficiently stated in the opinion of the Court.

McAllister, Wilson, and Petriken, for Plaintiff.

Miles and Dorris, for the Pennsylvania R. R. Company.

The charge of the Court was as follows, by

TAYLOR, P. J.—The plaintiff claims damages for injuries received in a collision of a passenger and a freight train upon the Pennsylvania Rail Road, on the 25th of July, 1851.

There is no room for controversy about any question of fact material in the decision of the case. That the collision occurred, and that the plaintiff was very seriously injured, so that he was afterwards confined to his room, under the care of a physician, and was disabled for a considerable time from engaging in any other employment, are facts clearly proven and not disputed. The testimony of the physician examined tends strongly, indeed, to show that the injuries complained of are such as are likely to render him, to some extent, disabled through life. That the accident happened through the negligence or mismanagement of the conduc-

tor of the burden train, seems also to be sufficiently established. If, therefore, the plaintiff had been a *passenger* upon the train, his case would be clearly made out, and you would have little else to do than to assess his damages. But, instead of being a passenger, or one whom the company had undertaken to carry, he was himself an employee or servant of the Company, and was at the time of the accident engaged in its service as baggage-master on the passenger train: and it is urged, in defence, that there is no rule of law or principle of policy recognized by the law, which gives him any right of action. And, in the absence of any difficulty about the facts, the case must turn upon the law governing it.

Although we have no decision of it by our own Supreme Court, the point here presented can scarcely be regarded as an open question; for other Courts, of the highest respectability, both in this Country and in England, have considered and decided it; and upon grounds so consonant with reason and correct principle, and so obviously just and politic, that their accuracy is not likely any where to be successfully questioned. The whole current of reported cases is to the effect that *one employee or servant has no right of action against the principal or master for an injury sustained through the negligence of another employee or servant in the same service*. It was so ruled in England, (*Priestly vs. Fowler*, 3 Mee. and W. 3,) in 1837. The same doctrine has since been affirmed there, and held here in Massachusetts, South Carolina, and New York. In 1844, the question was taken before the Supreme Court of Massachusetts, in *Farwell vs. The Boston and Worcester R. R. Company*, 4 Met. 49, a case not substantially different in its facts, and in no way distinguishable in principle, from the case now before this Court. It was viewed as a case of "first impression" in that State, and of great importance, and it was, therefore, very carefully considered; and the Court, in an elaborate opinion by Chief Justice SHAW, adopted the rule which had been established by the English Courts, and which had been elsewhere held in this Country. That case is cited with approval, and the principal ruled, given as the law, by Mr. Story in his *Treatise on Contracts*, (§ 453) a work of high authority, not only here, but as shown in one of the cases here

read, (70 En. C. L., 454,) in the English Courts, and by their judges. Still more recently, in 1851, the same principle was affirmed in England, in *Hutchinson's Executor vs. The York, Newcastle, and Branch R. R. Company*, 5 Ex. Rep., 344; a case in which, as in the present, the injury resulted from a collision through the unskilful or negligent management of one of the trains, and, in its general and material facts, resembling the case now before us.

Again, and nearer home, the same question was ruled in the same way, upon the authority of the leading cases now referred to by Judge LOWRIE, in the District Court of Allegheny County. *Strange vs. McCormick*, 10 American Law Journal, 398. In view of all these highly respectable authorities, opposed by no reputed case, we could not regard the question as unsettled, even if their reasoning did not commend itself to the approval of our own judgment; and we have no hesitation in stating the rule which they lay down to be the law.

It requires, indeed, as it seems to us, either sympathy for the sufferer, in an individual case of much apparent hardship, or prejudice against an incorporated Company, to bias any one into doubt of the reasonableness and justice of the law thus settled. And as similar risks exist in every business requiring a plurality of operatives, and as accountability on the part of the employer would have a tendency to increase rather than diminish them, this rule adopted by the Courts in the application of settled legal principles, is not only in itself just and reasonable, but is sanctioned by considerations of policy. We are all in danger hourly, either from our own carelessness or want of foresight of others around us. Almost every step through life is one of peril. The prosecution of every employment or business has its incident risks, with which one engaging in it is fairly supposed to be as well acquainted as his employer, and which it is but reasonable to say he undertakes to encounter. Without any express stipulation on the subject, it is a part of his contract. Otherwise, almost every contract of hiring would include in it a contract of insurance against the casualties, (so to speak,) of life. If you should employ two men to dig you a well, or fell your timber, or work your thrashing machine, it would

be at the risk of having one of them, through the fault or negligence of the other, and without any fault of yours, a pension upon you to the end of his days. And besides, as is justly said by Lord ABINGER, in *Preistly vs. Fowler*, "the servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and, in most of the cases in which danger may be incurred, if not all, he is just as likely to be acquainted with the probability and extent of it, as his master." So here, Mr. Mitchell acted voluntarily and also knowingly; for he, or any one sufficiently acquainted with the business, to take upon himself the duties of brakeman or baggage-master, knew quite as well as any stockholder in the Company, that the road had but one track; that, with the utmost care and skill that could be secured, there was danger of *accidental* collisions; and that, if entire safety would be attained by the constant and unremitting vigilance of two thousand men in different departments of the service, that, in the very nature of things, could not be expected. No effort or precaution of any Company employing so many men, though stimulated to watchfulness by the most powerful motive of interest,—the reputation of their road, the safety of their own property, and strict accountability for every valuable thing they carry for others,—could possibly guard against an occasional transgression of rules, through the negligence, recklessness, and even the occasional inebriety, of some of its numerous employees. There are, then, risks of the service, as apparent to any one who will reflect, as the breaking of a wheel or an axle; and risks which every one undertakes to encounter when he enters into the service, and against which there is and should be, no implied guaranty by the employer. "The principal is," says ALDERSON, B., in *Hutchinson vs. The York &c., Railway*, "that a servant, when he engages to serve a master, undertakes as between him and his master, to run all the ordinary risks of the service, and *this includes the risk of negligence on the part of a fellow servant*, whenever he is acting in discharge of his duty as servant of him who is the common master of both."

The present case, however, if it were necessary to push the inquiry further, does not depend upon the implication resulting from

the relations of the parties. The Pennsylvania Rail Road Company, as it appears by the testimony of Mr. Haupt, place in the hands of every man it employs, when he is employed, a printed book of rules and regulations, to which he is required to conform, if he enters into their employment; one of which is, that "*the regular compensation will cover all risk or liability FROM ANY CAUSE WHATEVER in the service of the Company.*" That, then, in every such case, becomes an express provision of the contract. *Austin vs. The Manchester Rail Road*, 70 English Com. L. 454. A copy of that book, it seems, was in the hands of the plaintiff. If so, his claim is not only in opposition to the rule of law, which reason, justice, and policy deduce from the relation of the parties, but to his own express contract.

But it is contended that there was, here, *gross negligence on the part of the Company*, which distinguishes this case from any of the cases cited: that McBride, the conductor of the burden train, was an intemperate man; that that fact was proven to the Company who still retained him; and that, therefore, the plaintiff is entitled to recover.

Whether, if the Pennsylvania Rail Road Company, or any other Company would employ and keep in their service an intemperate or incompetent servant, they would or would not be answerable to another employee or servant for the consequences of an injury happening *by means of his intemperance or incompetency*, it is not necessary for us to decide; for there is no evidence here upon which we could submit that question to the jury. There is no evidence that the *character* of McBride was that of an intemperate man; or that his occasional drunkenness was known to the Company; and *no evidence, whatever, that he was drunk at the time of the collision, or on that day; or that the collision happened through his intemperance.* He had been employed upon the road six or seven months. The only evidence of his intemperance is the testimony of Thomas Burchinell and Grafius Miller. Mr. B., who boarded with him at the same public house near Hollidaysburg, saw him once excited by liquor, when he was "lying over," or off duty, and that *the day before* the accident; and he was "*surprised*"

at it, for he had always considered him a sober man. Miller, who was also a conductor of a burden train, saw him drunk *once* the month before the accident, when he met some friends on some public occasion, in Lancaster. Does this testimony show that McBride's *character* was that of an intemperate man, so that the Company should have known it?—or, does it not prove the reverse? Besides, neither of these witnesses of the plaintiff, or any one else, proves that either of these two occasions of indulgence was made known to any stockholder of the Company, or any officer representing it, or whose business and duty it was to apply a corrective.

But the plaintiff says it was the duty of his witness, Miller, to have done so, and that he is presumed to have done his duty, and that the Company is presumed to have been informed on the subject! It might be answered, that (since the use of intoxicating liquors is prescribed by the printed rules and regulations,) it was the duty of somebody, who it is equally to be presumed did *his* duty, to dismiss him upon a knowledge of the fact; but he remained on the road, although it appeared to be the constant aim, as it was the highest interest of the Company, to have only sober men in their service. The most reasonable conclusion, therefore, is, that in this, Mr. Miller did *not* do his duty; and, if he had done it, the plaintiff, moreover, would probably have proved it by him. Nor would it distinguish the case if the accident happened *through the negligence of Miller* in not giving such notice to the Company. But what is decisive in this matter, is, that there is an entire absence of proof *that McBride was drunk at the time, and that the accident and the injury were results of his drunkenness*. On the contrary, the only evidence on the point, tends to show that he was *not* drunk. Isaac Furlin, who had seen and spoken to him a very short time before, and who says, “he always appeared to be a sober, steady man,” says he then noticed nothing unusual about him.

In no view, then, which can be taken of the facts of this case, can the action be maintained; and your verdict, gentlemen, should be for the defendant.

Verdict for the defendant.¹

¹ Exceptions were filed, and the case will go to the Supreme Court.